

CHAPTER 3

Other Related Offenses

3.22 Malicious Use of Phone Service

A. Statutory Authority

Effective November 1, 2002, 2002 PA 577 amended numerous provisions of MCL 750.540e. Accordingly, the existing language in subsection (A) of the *Sexual Assault Benchbook* should be replaced with the following language:

MCL 750.540e provides:

“(1) A person is guilty of a misdemeanor who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by any of the following:

“(a) Threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device.

“(b) Falsely and deliberately reporting by message through the use of a telecommunications service or device that a person has been injured, has suddenly taken ill, has suffered death, or has been the victim of a crime or an accident.

“(c) Deliberately refusing or failing to disengage a connection between a telecommunications device and another telecommunications device or between

a telecommunications device and other equipment provided for the transmission of messages through the use of a telecommunications service or device.

“(d) Using vulgar, indecent, obscene, or offensive language or suggesting any lewd or lascivious act in the course of a conversation or message through the use of a telecommunications service or device.

“(e) Repeatedly initiating a telephone call and, without speaking, deliberately hanging up or breaking the telephone connection as or after the telephone call is answered.

* * *

“(g) Deliberately engaging or causing to engage the use of a telecommunications service or device of another person in a repetitive manner that causes interruption in telecommunications service or prevents the person from utilizing his or her telecommunications service or device.”

“A communication that either originates or terminates in this state is a violation of MCL 750.540e and may be prosecuted at the place of origination or termination.” MCL 750.540e(2).

See MCL 750.540c for the definitions of “telecommunications,” “telecommunications service,” and “telecommunications device.”

B. Penalties

Effective November 1, 2002, 2002 PA 577 amended the maximum statutory fine from \$500.00 to \$1,000.00. MCL 750.540e(2).

CHAPTER 7

General Evidence

7.2 Rape Shield Provisions

G. Evidence of Prior Sexual Conduct Involving Defendant

Insert the following case summary as the last bullet in Section 7.2(G), after the summary of the *Johnson* case:

F *Lewis v Wilkinson*, ___ F3d ___ (CA 6, 2002):

In this federal habeas corpus case, a jury in the Ohio Court of Common Pleas convicted the defendant of rape after he sexually penetrated the victim in her dorm room at the University of Akron. The defendant and victim were friends who met during their first year of college. The defense at trial was consent. At issue on appeal was the trial judge's refusal to admit into evidence specific portions of the victim's diary under Ohio's rape shield statute, which is substantially similar to Michigan's rape shield statute under MCL 750.520j. The diary entry at issue during the trial and on appeal was as follows (the excluded statement is italicized):

"I can't believe the trial's only a week away. I feel guilty (sort of) for trying to get Nate [the defendant] locked up, but his lack of respect for women is terrible. I remember how disrespectful he always was to all of us girls in the courtyard . . . he thinks females are a bunch of sex objects! And he's such a player! He was trying to get with Holly and me, and all the while he had a girlfriend. I think I pounced on Nate because he was the last straw. That, and because I've always seemed to need some drama in my life. Otherwise I get bored. That definitely needs to change. I'm sick of men taking advantage of me . . . *and I'm sick of myself for giving in to them. I'm not a nympho like all those guys think. I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends.* *Id.* at _____. [Emphasis added.]

The defendant claimed that the trial judge's failure to admit the italicized statements amounted to a denial of his Sixth Amendment right to confront the witness. The Ohio Court of Appeals affirmed defendant's conviction. The Ohio Supreme Court denied leave to appeal, dismissing the appeal as not involving any substantive constitutional question, even though the Supreme Court was presented with defendant's Sixth Amendment issue. The United States District Court for the Northern District of Ohio denied

defendant's petition for habeas corpus. The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's denial of habeas relief, remanding with directions to issue a conditional writ of habeas corpus. The Sixth Circuit Court of Appeals held that the trial court violated defendant's Sixth Amendment right to confront witnesses when it refused to admit the foregoing italicized statements, finding that the judge could have reduced the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and reputation:

“[Defendant] was denied his Sixth Amendment right to confrontation when the trial court excluded several statements from the alleged victim's diary. The statements at issue, especially when read with the diary entry in its entirety, can reasonably be said to form a particularized attack on the witness's credibility directed toward revealing possible ulterior motives, as well as implying her consent. This court recognizes the difficulty a trial judge faces in making an evidentiary decision with the urgency that surrounds the wrapping up of pretrial loose ends prior to the start of jury selection. The trial court took the state's interests in protecting rape victims into account in excluding the statement, but did not adequately consider the defendant's constitutional right to confrontation. The jury should have been given the opportunity to hear the excluded diary statements and some cross examination [sic], from which they could have inferred, if they chose, that the alleged victim consented to have sex with the [defendant] and/or that the alleged victim pursued charges against the [defendant] as a way of getting back at other men who previously took advantage of her. The trial court can reduce the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and her reputation.” *Id.* at ____.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.2 Post-Conviction Bail

D. Appellate and Trial Courts Have Concurrent Jurisdiction to Decide Bail

Insert the following Note after the first full paragraph on p 445:

Note: The Michigan Supreme Court has held that an application for a federal writ of habeas corpus does not constitute a criminal “appeal” under MCL 770.8, the statute permitting bail during the process of appeal, since a court’s authority under MCL 770.8 is “limited to the time *during* the appellate process, and federal habeas corpus proceedings are not a continuation of that process. *People v Jones*, ___ Mich ___, ___ (2002) (emphasis in original).

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.3 Defenses to Civil Actions

A. Statutes of Limitations for Civil Actions

2. Commencement of Limitations Period and the “Discovery Rule”

Insert the following language at the end of the first partial paragraph on p 486:

“See also *Hoekstra v Bose*, ___ Mich App ___ (2002), where the Court of Appeals held that under MCL 600.5856 the limitations period is tolled upon the proper filing and serving of a complaint and summons, even though the court may not have acquired personal jurisdiction over the defendant.”